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JUN 15 1994

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Section 309(j))	PP Docket No. 93-253
of the Communication Act -)	
Competitive Bidding)	
)	

In the Matter of)	GEN Docket No. 90-314
)	ET Docket No. 92-100
Amendment of the Commission's)	PP-4, PP-5, PP-11,
Rules to Establish New)	PP-14, PP-35 through
Narrowband Personal)	PP-40, PP-53, PP-69,
Communications Services)	PP-79 through 85
)	

ECHO GROUP L.P.
PETITION FOR STAY OR TO CONDITION GRANT OF CERTAIN
NATIONWIDE NARROWBAND PCS LICENSES

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SUMMARY

Echo Group L.P. ("Echo") requests that the Commission stay the auction and grant of at least one nationwide 50 kHz/50 kHz paired license for narrowband PCS pending the outcome of Echo's Petition for Review now pending before the United States Court of Appeals for the District of Columbia Circuit regarding Echo's application for a pioneer's preference. Echo Group L.P. v. FCC, Case No. 94-1353 (D.C. Cir. filed May 3, 1994). Alternatively, Echo asks that the Commission specifically condition the auction and grant of at least one such license on the same basis.

The auction of the nationwide narrowband PCS licenses is scheduled to begin July 24, 1994. Echo's appeal will likely not be resolved until after all available nationwide blocks of spectrum for narrowband PCS will have been allocated. In the event that Echo's appeal is successful, the pioneer's preference it obtains will be an empty grant unless it is able to obtain the spectrum necessary to implement its mobile data radio service. Thus, a stay of the auction for, or the specific conditioning of, at least one license for spectrum appropriate for Echo's MDRS pending the resolution of Echo's appeal is necessary.

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Petition for Stay or to Condition Grant
of Certain Nationwide Narrowband PCS Licenses

Echo Group L.P. ("Echo"), by its attorneys and pursuant to Sections 1.43, 1.44(e), and 1.45(d) and (e) of the Commission's Rules, hereby requests the Commission to stay the auction and grant of at least one nationwide 50 kHz/50 kHz paired license for narrowband PCS pending the outcome of Echo's Petition for Review (and the Petitions for Review and Notices of Appeal of other narrowband PCS pioneer's preference applicants) now pending before the United States Court of Appeals for the District of Columbia Circuit regarding its application for a pioneer's preference. Echo Group L.P. v. FCC, Case No. 94-1353 (D.C. Cir. filed May 3, 1994) ("Echo Appeal"); See also Advanced Cordless Technology v. FCC, Case No.

94-1296 (D.C. Cir. filed April 4, 1994); Freeman Engineering v. FCC, Case No. 94-1286 (D.C. Cir. filed April 15, 1994); Paging Network v. FCC, Case No. 94-1327 (D.C. Cir. filed April 18, 1994) (collectively, including the Echo Appeal, the "Appeals"). Alternatively, Echo asks the Commission to condition the auction and grant of at least one such license on the same basis.

Standing

The Commission has scheduled nationwide narrowband PCS spectrum auctions to begin July 24, 1994. FCC Public Notice, Report No. AUC-94-01, Auction No. 1 (rel. May 23, 1994) ("Auction Public Notice") Once this auction process is completed and the licenses issued, all the available nationwide blocks of spectrum for narrowband PCS will have been allocated.

In its Appeal, Echo, pursuant to Section 402(a) of the Act, asks the Court to hold unlawful and vacate the Commission's decision in Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion & Order, 9 FCC Rcd 1309 (1994) ("MO&O") to the extent that the MO&O denies its application for a pioneer's preference in the narrowband PCS spectrum. Although the Echo Appeal and the other Appeals have been docketed by the Court and can be expected to proceed in a timely manner, they will not

be resolved prior to completion of the narrowband PCS spectrum auction and licensing processes. Therefore, in the likely event that the Court reverses the Commission's denial of Echo and one or more of the other appellants' applications, the judgment so obtained would be frustrated because, as set forth more fully below, appellants may not be able to obtain the appropriate spectrum.¹

Thus, Echo would be aggrieved and its interests adversely affected by the auctioning of all nationwide narrowband PCS spectrum prior to resolution of its Appeal. Echo therefore has standing as a party in interest to file the instant Petition. See, e.g., Clarke v. Securities Industry Assoc., 479 U.S. 388 (1987); Associa-

¹ The grant of Commission licenses are conditioned upon resolution of administrative or judicial action affecting the license. See, e.g., Amendment of Part 22 of the Commission's Rules to Provide for Filing and Processing of Applications for Unserved Areas, 8 FCC Rcd 1363, 1364 (1993); Metro Mobile CTS, 7 FCC Rcd 1822 (1992); Stereo Seven Associates, 2 FCC Rcd 1758 (1987). Here, however, the administrative complexities that would result in trying to sort out the rights and obligations of various auction winners and determine which narrowband PCS license each pioneer preference holder was to receive would be extremely burdensome to the Commission, the pioneer's preference holders and the initial auction winners, and would delay beneficial service to the public. At that point, the Commission and undoubtedly the Courts would be called upon to "unscramble the eggs," in effect. See Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 261 (2d Cir. 1989); Klaus v. Hi-Shear Corp., 528 F.2d 225, 234 (9th Cir. 1975).

tion of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940); NBC v. FCC, 132 F.2d 545, 548-549 (D.C. Cir.), aff'd, 318 U.S. 239 (1943); Northco Micro-wave, Inc., 1 F.C.C.2d 350, 351-2 (1965).

Argument

I. The Commission Should Stay the Narrowband PCS Auction for Certain Licenses Pending Resolution of the Appeals

The Commission should stay the auction of certain narrowband PCS licenses for technically suitable and adequate spectrum meeting Echo's needs (and those of other appellants seeking Court review of the denial of their pioneer's preference requests).

Echo's proposed mobile data radio service ("MDRS") requires, and qualifies under the pioneer's preference criteria for, paired nationwide frequency in the 940 MHz or 930-931 MHz band. A suitable allocation for Echo could be made from nationwide Frequency Blocks 1-8.² The Commission should exclude an appropriate Block

² The Commission has already designated Blocks 5 and 8 for minority and/or women-owned applicants. Auction Public Notice at 2. Thus, Echo's allocation could be made from Blocks 1-4, 6 or 7. As set forth in its pleadings in the pioneer's preference docket, the best allocation for Echo's two-way, real-time, duplex service would be one of the nationwide 50 kHz/50 kHz licenses (i.e., Blocks 1-4). See Echo
(continued...)

from the upcoming auctions of these Blocks. Upon resolution of the Echo Appeal, the Commission would either grant Echo the spectrum pursuant to Echo's pioneer's preference, or if Echo is unsuccessful on Appeal, hold an auction for the license(s) previously set aside.

The advantages of the stay over conditional licensing discussed below are that the stay will result in maximum proceeds to the government for the spectrum and is easier to administer. Conditional licenses may not garner as much interest, and therefore as high bids, at auction. In addition, if the Appeals result in one or more additional pioneer's preference awards, burdensome and costly administrative litigation would certainly ensure to determine which conditional licenses need to be withdrawn. Further, the Commission would eventually have to refund the original licensee's bid upon cancellation of the license. Stayed licenses, on the other hand, will either be granted to pioneer's preference holders or awarded at later auction for their full value.

²(...continued)

Group L.P. Request for Pioneer's Preference, GEN Docket No. 90-314, ET Docket No. 92-100, PP-36, at 2, 12-13 (filed July 30, 1991) ("Request for Pioneer's Preference"); Echo Group L.P. Petition for Rulemaking, RM-7782, at 4-7, 9-10 (filed July 30, 1991) ("Petition for Rulemaking").

II. Echo's Request Meets the Criteria For Granting a Stay

The Commission evaluates petitions for stay under well-settled principles. To support a stay, the petitioner must demonstrate: (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of a stay. General Telephone Co. of California, 8 FCC Rcd 8753, 8753 (1993) (citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 673-74 (D.C. Cir. 1985); Washington Metropolitan Area Transit Comm'n. v. Holiday Tours, Inc., 559 F.2d 841, 842-43 (D.C. Cir. 1977); Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958)); see also Eagle Telecommunications, Inc., File No. W-P-C-4218, W-P-C-4615, Order, 1984 FCC LEXIS 2793 (rel. May 8, 1984). Echo's request for stay meets these requirements.

A. Echo Will Ultimately Prevail on the Merits

In denying Echo's request for a pioneer's preference on reconsideration, the Commission made virtually no substantive analysis of the merits of Echo's arguments. It stated that MDRS was developed and initially designed for implementation in services in which its use is already authorized; that Echo had not demon-

strated how MDRS differs from existing or proposed two-way data service on cellular frequencies or other 800/900 MHz frequencies; and that Echo had not shown with specificity the developments for which it is responsible that allow MDRS to be used on narrowband PCS frequencies.

MO&O, 9 FCC Rcd 1309, 1318.

Echo previously addressed these findings in its petition for reconsideration of the Commission's initial decision on the merits of Echo's application, Amendment of the Commission's Rules to Establish New Personal Communications Services, First Report and Order, 8 FCC Rcd 7162 (1993) ("Report and Order"). See Echo Group L.P. Petition for Reconsideration, at 4-11 (filed Sept. 10, 1993) ("Petition for Reconsideration"). The MO&O does not address Echo's Petition for Reconsideration at all, but merely restates the conclusory findings in the Report and Order.³ This is inadequate under the Administrative

³ In addition, the Commission stated that Echo does not explain how its cost figures were derived even though they are key to Echo's claim of economical benefits from MDRS. MO&O, 9 FCC Rcd 1309, 1318. Echo's cost estimates were in fact provided by Dr. Bruce Lusignan, Director of Stanford University's Communications Satellite Planning Center, a member of Stanford's Center for Telecommunications, Chairman of Transtech International, and a well respected engineer, telecom expert and consultant. See MDRS Progress Report (filed June 1, 1991) (submitted as part of Echo's technical feasibility showing) ("MDRS (continued...)")

Procedures Act. See, e.g., Puerto Rico Higher Education Assistance Corp. v. Riley, 10 F.3d 847, 849 (D.C. Cir. 1993).

Indeed, Echo's proposal is no less innovative than that of those who received pioneer's preference awards. As Echo has previously demonstrated, MDRS can deliver 5 to 15 times greater spectrum efficiency and 10 to 30 times greater capacity than the proposals of other innovators that did receive a pioneer's preference. Petition for Reconsideration, at 6 & Appendix A. Thus, the Commission's denial of Echo's pioneer's preference request was arbitrary and capricious, and Echo will ultimately prevail on the merits.

B. Echo Will Suffer Irreparable Injury
Absent a Stay

As discussed above, if the Commission does not stay the auction proceeding or otherwise condition a specific narrowband PCS license pending the outcome of

³(...continued)

Progress Report"). No one has challenged these cost figures throughout the pioneer's preference proceeding. Moreover, the basis of cost estimates was not, and has never been, a criteria upon which pioneer's preference requests were to be judged. The Commission was incorrect in creating a new requirement in the MO&O without providing interested parties with an opportunity for notice and comment. Administrative Procedures Act § 553, 5 U.S.C. § 553(b), (c). See, e.g., Connecticut Power & Light c. NRC, 673 F.2d 525, 533 (D.C. Cir. 1982).

Echo's appeal, Echo would be prohibited from obtaining the benefits of a nationwide pioneer preference for its innovative MDRS. Echo is the sort of small, entrepreneurial, innovative business the pioneer's preference policy is designed to benefit. The estimated cost of a nationwide narrowband PCS license at auction is well beyond what Echo could pay.⁴ Thus, without an effective pioneer's preference Echo would be unable to get the nationwide license that its efforts and proposed service warrant. See Request for Pioneer's Preference at 12-13 (specifically seeking nationwide license because MDRS is inherently a nationwide service).

C. Others Will Not Suffer Substantial Harm
By Grant of the Stay

No other parties will suffer harm from grant of the stay requested herein. No party has vested rights in

⁴ While Echo is well qualified financially to implement MDRS, the added financial burden of full payment for the license within a short timeframe would be difficult to meet. The Commission has determined that installment payments will not be available for nationwide narrowband licenses won by qualified small businesses. Public Notice, Erratum to Report No. AUC-94-01 (rel. May 27, 1994). Thus, a 20% down payment must be made within five business days after bidding is closed and the remainder is due in full within five business days after grant of the license. Absent a pioneer's preference and the financial support it would bring, Echo would not be able to make full payment in the timeframe contemplated.

having the narrowband PCS auction for each nationwide license begin on July 24, 1994. Nor, if the Commission announces the stay as soon as possible, will great resources have been expended upon preparing for the auction.

D. A Stay Will Serve the Public Interest

The process leading to the narrowband PCS auction has already been complicated. Conducting the auction subject to the results of the Echo Appeal (and the other pending Appeals), particularly without specific notice to the participating bidders as discussed below as alternate relief, could result in even greater complexities as parties litigate their interests. Holding off the auction of the relevant license(s) pending the Appeals would simplify the auction and licensing process and maximize the value of the licenses. By avoiding the litigation that would result from confusion, the stay would also serve to bring the widest variety of innovative new services to the public sooner.⁵

⁵ Echo has demonstrated that MDRS technology is an innovative, spectrum-efficient and cost-effective two-way data system. See, e.g., Petition for Reconsideration, at Appendix A; MDRS Progress Report. The public will not be able to benefit expeditiously from this exciting technology even if Echo is granted a pioneer's preference unless Echo has a timely means of accessing some of the narrowband PCS spectrum now proposed to be auctioned.

In analogous cases involving rulemakings, the Commission has determined that it should not grant construction permits pending the promulgation of final rules in order to avoid prejudicing the outcome of the rulemaking. See Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963); Harvey Radio Laboratories v. U.S., 289 F.2d 458 (D.C. Cir. 1961).

III. Alternatively, the Commission Should
Condition the Grant of Licenses by
Auction on the Resolution of the Appeals

If the Commission does not grant the stay requested herein, the Commission should condition licenses issued pursuant to the July auction on the results of the Echo Appeal in one of two ways. The Commission has in the past recognized that specific conditional licenses are appropriate under similar circumstances to ensure that an appealing party's position in connection with its application are not prejudiced by action granting a license to another party. See Jaybar Communications, 7 FCC Rcd 2375 (1992).

First, the Commission could designate now the spectrum that is subject to conditional grant and specify a process by which licenses granted through the auction would be withdrawn. Any construction and operation of facilities pursuant to these licenses would then explic-

itly be at the risk of the licensee and should confer upon the licensee no advantage, direct or indirect, of any nature whatsoever in connection with the consideration of the appellants' claims and/or a decision to grant the appellants' pioneer's preference requests.

For instance, the Commission could designate licenses for Frequency Blocks 1, 2, 3 or 4 as being conditioned on the outcome of Echo's appeal and subject to reversion to Echo if Echo is ultimately awarded a pioneer's preference. (The Commission could also designate the order in which any other appropriate blocks would be allocated to additional pioneer's preference holders, should they also be successful on appeal. Thus, if one appellant were successful, the license for Block 1 might be withdrawn. If two appellants were successful, the licenses for Block 1 and Block 2 could be withdrawn, etc.) This method ensures that only those licenses actually at risk of being withdrawn would be affected during the auction process. Bidders for the license(s) would also know exactly what they were getting and the possibility that their license would be withdrawn.⁶ This avoids delay now of the auction while

⁶ Increased clarity in setting forth the rights and obligations of licensees is desirable. See, e.g.,
(continued...)

ensuring that bidders have due process notice. It also provides for orderly license withdrawal upon resolution of the Appeals.

Alternatively, all licenses issued pursuant to the auction could be made subject to and conditioned upon the Court's action in the Appeals and final administrative and judicial resolution of Echo's application (and those of other appellants seeking to obtain pioneer's preferences). This approach allows the Commission to move ahead without significant additional tasks before the auction, gives all parties participating in the auction due notice of the Appeals and their possible effect, but requires the Commission and the parties to sort out who gets what after the fact if any of the appellants are successful. Because of this latter uncertainty, Echo submits that the former alternative is preferable.

⁶(...continued)

McElroy Electronics Corp. v. FCC, 990 F.2d 1351, 1358 (D.C. Cir. 1993).

Conclusion

WHEREFORE, for the above reasons, Echo requests that the narrowband PCS auction scheduled to begin July 24, 1994 be stayed with respect to licenses affected by its Appeal. Alternatively, Echo requests that any licenses granted pursuant to the auction for frequency appropriate for its MDRS service and its pioneer's preference request be specifically conditioned upon the resolution of the Echo Appeal currently pending before the United States Court of Appeals for the District of Columbia.

Respectfully submitted,

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Dated: June 15, 1994

CERTIFICATE OF SERVICE

I, Howard S. Klotz, do hereby certify that on this 15th day of June, 1994 that I have served a copy of the foregoing Petition for Stay or to Condition Grant of Certain Nationwide Narrowband PCS Licenses of Echo Group L.P. via first class mail, postage prepaid to the parties on the service list below.


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